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Mailed:
December 21, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jonathan D. Butts

Serial No. 76481350

John Alumit of Patel & Alumit, P.C. for Jonathan D. Butts.

Mitchell Front, Trademark Examining Attorney, Law Office
111 (Craig Taylor, Managing Attorney).

Before Walters, Chapman, and Drost, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On January 10, 2003, Jonathan D. Butts (applicant)
filed an intent-to-use application (No. 76481350) to
register on the Principal Register the words THE BBQPITSTOP
in the design shown below for "restaurant services" in
International Class 43.



The examining attorney has refused to register applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because of two registrations, owned by the same entity, for the marks shown below for "restaurant services" in International Class 42.¹



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The examining attorney (brief, fourth page) argues that the "wording 'BBQPITSTOP' in the applicant's mark is nearly identical to the wording 'BARBEQUE PIT-STOP' in the marks of the registrant." Furthermore, the examining

¹ As of April 1, 2002, restaurant services are now classified in International Class 43.

² Registration No. 1,403,523 issued July 29, 1986. Section 8 and 15 affidavits have been accepted and acknowledged, respectively. The registration contains a disclaimer of the words "Gourmet Barbeque Drive-Thru."

³ Registration No. 1,406,280 issued August 19, 1986. Section 8 and 15 affidavits have been accepted and acknowledged, respectively. The registration contains a disclaimer of the words "Gourmet Barbeque."

attorney maintains that the words "'BARBEQUE PIT-STOP' represents a significant element of the registrant's marks." The examining attorney also points out that the services of applicant and registrant are identical and concludes that there is a likelihood of confusion.

Applicant, on the other hand, argues (brief, second page) that "the dominant feature[s] of Registrant's marks are the wording 'Maurice's Gourmet' and the prominent design of the little house" and "[a]bsent this wording, consumers are not likely to associate Applicant's mark with those of the Registrant." Applicant also indicates that even the overlapping parts of the marks are not identical.

After the examining attorney made the refusal final, this appeal followed.

We reverse.

When there is a question of likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to

the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin by noting our agreement that the services in this case are identical. Therefore, the key issue is whether the marks shown below are confusingly similar when they are used on restaurant services.



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The question is whether marks are similar in sound, appearance, or meaning such that they create similar overall commercial impressions. "When it is the entirety of the marks that is perceived by the public, it is the entirety of the marks that must be compared." Opryland USA Inc. v. Great American Music Show Inc., 970 F.2d 847, 23 USPQ 1471, 1473 (Fed. Cir. 1992). However, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided [that] the ultimate conclusion rests

on consideration of the marks in their entirety." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

We start by noting that each of the three marks contains a design element. There is little, if any, similarity between the design elements of applicant's and registrant's marks. Regarding the words in the marks, THE BBQPITSTOP and MAURICE'S GOURMET BARBECUE PIT-STOP,⁴ there are numerous differences. Registrant's marks begin with the words "MAURICE'S GOURMET." There is no evidence that "Maurice's" is a weak term when applied to restaurant services.⁵ Moreover, we agree with applicant that the term "Maurice's" would likely be the dominant term that prospective purchasers would use to distinguish registrant's restaurant services from those of others. Furthermore, we note that the differences do not stop at registrant's additional term "Maurice's." The registrant also adds the disclaimed term "Gourmet"; registrant and applicant spell the words "Barbeque/BBQ" differently; "Pit-Stop" is spelled with and without a hyphen; applicant's mark includes the word "the"; and the words "Barbeque Pit-Stop" and "BBQPitStop" are spelled with and without spaces.

⁴ One registration also adds the disclaimed term "DRIVE-THRU."

⁵ The term "Gourmet" has been disclaimed in both registrations.

While there are some similarities between applicant's and registrant's marks inasmuch as they both contain versions of the words "Barbecue"⁶ and "Pit Stop," overall the marks THE BBQPITSTOP and MAURICE'S GOURMET BARBEQUE PIT-STOP look different. The difference in appearance is reinforced by the fact that there is virtually no similarity between the designs. Furthermore, the phonetically similar term "Barbeque/BBQ" that appears in the three marks would be a generic term for a restaurant that serves barbecue. The "'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'" Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). Also, the meaning of the marks would be different inasmuch as registrant's marks would create the impression that they are restaurants associated with an individual known as Maurice while there is no similar impression for applicant's restaurant services.

⁶ We grant the examining attorney's request (Brief, fourth page) that we take judicial notice of the additional spellings of the word "barbecue," i.e., "barbeque" and "BBQ." University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

We understand that a "[s]ide by side comparison is not the test," Grandpa Pigeon's of Missouri, Inc. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973), and that "[h]uman memories ... are not infallible," In re Research and Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), quoting, Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd., 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). However, it is not likely that prospective purchasers would believe that these restaurants are associated with the same source simply because the marks contain, inter alia, variations of the term, "barbecue pit stop." While it is possible that some consumers may believe that there is an association between the marks, the "statute refers to likelihood, not the mere possibility, of confusion." Bongrain International (American) Corp. v. Delice de France, Inc., 811 F.2d 1479, 1 USPQ2d 1775, 1779 (Fed. Cir. 1987).

Inasmuch as there are significant differences in appearance and meaning between the marks and the commercial impressions of the marks would be different, we find that, when the marks are considered in their entirety, there is no likelihood of confusion. See Champagne Louis Roederer S.A. v. Delicato Vineyards, 148 F.3d 1373, 47 USPQ2d 1459,

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1460 (Fed. Cir. 1998) ("CRISTAL and CRYSTAL CREEK evoke very different images in the minds of relevant consumers").

Decision: The refusal to register is reversed.